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NO. 94, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

State of South Carolina,

Plaintiff,

vs.

Donald T. Regan, Secretary of the Treasury of the United States of America,

Defendant.

PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM

T. TRAVIS MEDLOCK
Attorney General

GRADY L. PATTERSON, III
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211

SINKLER GIBBS & SIMONS
Huger Sinkler
Karen LeCraft Henderson*

Post Office Box 11458
Columbia, SC 29211
(803) 765-1885

ATTORNEYS for Plaintiff.
*Counsel of Record.

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM

Pursuant to Rule 9.6 of the Rules of the Supreme Court of the United States, the plaintiff State of South Carolina respectfully asks leave of the Court to file the Supplemental Memorandum which is submitted herewith. This motion is made in response to the defendant's supplemental memorandum which

he has heretofore moved for leave to file on the assumption that his motion will be granted.

T. TRAVIS MEDLOCK
Attorney General

GRADY L. PATTERSON, III
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211

SINKLER GIBBS & SIMONS
Huger Sinkler
Karen LeCraft Henderson*

Post Office Box 11458
Columbia, SC 29211
(803) 765-1885

By: Karen LeCraft Henderson
ATTORNEYS for Plaintiff.

*Counsel of Record.

September 8th, 1983.

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PLAINTIFF'S SUPPLEMENTAL MEMORANDUM

This memorandum responds to the defendant's assertion contained in his supplemental memorandum that the Court should in its discretion decline to assume original jurisdiction based on the Anti-Injunction Act and the Declaratory Judgment Act.

The defendant in effect re-argues his original contention. The defendant asserts that the Anti-Injunction Act and the

Declaratory Judgment Act "should govern, or guide" this Court in the exercise of its original jurisdiction. Supplemental Memorandum for the Defendant page 1. Despite his use of the word "guide", he then argues, without citation of authority:

> ...But it hardly follows that every remedial or procedural rule enacted by Congress is inapplicable to original proceedings in this Court, even if the end result is to bar the suit. Id. 3.

In other words, notwithstanding the clear language of Article III, Section 2 of the United States Constitution that "(i)n all cases...in which a State shall be Party, the Supreme Court shall have original Jurisdiction," he continues to assert that the Congress may limit or destroy its mandate. In so doing, he takes a position that the legislative branch may determine a dispute intended by the Constitution to be decided by this Court. His position not only conflicts with the plain meaning of Article III of the Constitution but it destroys the

intent of the framers of the Constitution:

> ...'(T)here is no liberty, if the power of judging be not separated from the legislative and executive powers.' THE FEDERALIST NO. 78 (A. Hamilton).

There are two further comments that we would make in response to the defendant's argument regarding the Anti-Injunction Act and the Declaratory Judgment Act. South Carolina's action relates to taxes because the sanction imposed by the challenged provision relates to taxes. But South Carolina is not a taxpayer within the purview of the two statutes whose prohibition he seeks to apply. Irrespective of whether or not a suit which is not a taxpayer's suit is barred by those two statutes, their prohibition can extend only to those courts whose original jurisdiction the Congress is empowered to regulate. Finally, because South Carolina and the defendant apparently agree that the Court's exercise of original jurisdiction here is a matter solely within

its discretion, the question of whether or not it should be exercised necessarily involves an inquiry into the available alternatives to its exercise. The defendant's suggestion that South Carolina may continue to issue its bearer bonds and then "actively support" a taxpayer who subsequently questions the taxability of the interest is patently unworkable. First, if South Carolina were to continue to issue bearer bonds, they could not be sold while their tax exempt status remains in dispute. If bearer bonds were successfully sold, the interest rate which South Carolina would have to pay would be so exorbitantly high as to impair, perhaps fatally, South Carolina's power to borrow money. 1/

1/ Cf. Weston v. City Council of Charleston, 16 S.C.L. (Harp.) 219, 224 (1824) (Huger, J., dissenting):

> ... It will be in vain for Congress to pass acts authorizing the Secretary of the Treasury to borrow money, if the holders of their stock can be taxed by the States

Contrary to the defendant's statement that "South Carolina has indicated its intention to issue bearer bonds" (Supplemental Memorandum for the Defendant 7, n. 7), South Carolina intends to, and must, continue to issue marketable general obligation bonds. Complaint ¶ 8; Motion for Leave to File Complaint, Complaint & Supporting Brief at 6-7, 13-14, 35. [2/]

[1/] (cont.)
for having lent. Congress may offer ten per cent. for loans but who will lend, if the States can appropriate the whole to their use.

[2/] The $65 Million State Capital Improvement Bonds offered for sale on September 13, 1983, will be fully registered bonds convertible into bearer bonds only if such action would not impair the tax exempt status of the interest of the bonds.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

GRADY L. PATTERSON, III
Assistant Attorney
General

Post Office Box 11549
Columbia, SC 29211
(803) 758-3970

SINKLER GIBBS & SIMONS
Huger Sinkler
Karen LeCraft Henderson*

Post Office Box 11458
Columbia, SC 29211
(803) 765-1885

CERTIFICATE OF SERVICE

I, KAREN LeCRAFT HENDERSON, counsel of record for the plaintiff and a member of the Bar of the Court, do hereby certify that, in accordance with Rule 28.4(a), three (3) copies of the Plaintiff's Motion For Leave To File Supplemental Memorandum And Supplemental Memorandum were served on all parties required to be served on this date by depositing same in the United States mail, first-class postage prepaid, and addressed as follows: The Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and The Honorable Donald T. Regan, Secretary of the United States Treasury, Department of the Treasury, 1500 Pennsylvania Avenue, N.W., Washington, D.C. 20220.

This 8th day of September, 1983.

Karen LeCraft Henderson

KAREN LeCRAFT HENDERSON

Post Office Box 11458
Columbia, SC 29211